



ASSOCIATION OF TELEMESSAGING
SERVICES INTERNATIONAL, INC.

1200 19TH STREET, N.W.
WASHINGTON, D.C. 20036-2412
(202) 429-5151
FAX (202) 223-4579

September 4, 1996

DOCKET FILE COPY ORIGINAL

SEP 4 - 1996

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments, CC Docket No. 96-152

Dear Mr. Caton:

Enclosed please find an original and eleven copies of Comments of the Association of Telemessaging Services International (ATSI) in the proceeding, FCC 96-310, CC Docket No. 96-152. Additional copies have been delivered to Janice Myles of the Common Carrier Bureau and the International Transcription Services.

Sincerely,

Herta Tucker
Executive Vice President

cc: International Transcription Services, Inc.
2100 M Street, N.W., Suite 140

Janice Myles (1 copy plus diskette)
Common Carrier Bureau
1919 M Street, N.W., Room 544

No. of Copies rec'd
List ABCDE

011

**Before the
Federal Communications Commission
Washington, D.C. 20554**

SEP 4 - 1996

In the Matter of)

Implementation of the)
Telecommunications Act of 1996:)

CC Docket No. 96-152

Telemessaging,)
Electronic Publishing, and)
Alarm Monitoring Services)

DOCKET FILE COPY ORIGINAL

**Comments of the Association of
Telemessaging Services International**

**ASSOCIATION OF TELEMESSAGING
SERVICES INTERNATIONAL (ATSI)**

Frank Moore
Smith, Bucklin & Associates, Inc.
Government Affairs Division
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5100

Its Regulatory Counsel

Herta Tucker
Executive Vice President
Association of Telemessaging Services International
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5151

Summary of Comments

The statutory language of Section 260 of the Telecommunications Act of 1996 is clear and unambiguous. Section 260(a) creates a prohibition against anticompetitive conduct on the part of incumbent network owners and Section 260(b) creates a procedure through which telemessagers may seek expedited relief from such conduct.

Congress has recognized that incumbent network owners have the potential to gain unfair and anticompetitive market advantages that must be prohibited in order to achieve the goals of the 1996 Act. Section 260(a) creates an absolute prohibition against: 1) the direct or indirect subsidization of any telemessaging operation on the part of an incumbent network owner; and 2) preferential or discriminatory treatment on the part of the incumbent network owner in favor of its own telemessaging operations. The Commission must implement safeguards that will prevent the occurrence of this prohibited conduct and recognize that any violation of these safeguards represents a *prima facie* claim eligible for Section 260(b) relief.

In addition to the prohibitions of Section 260(a), Section 260(b) provides an expedited complaint process through which telemessagers may bring to the attention of the Commission: 1) any conduct or practices that violate these prohibitions; or 2) any circumstances that result from such conduct or practices. The Commission is authorized to provide immediate relief from any violations of prohibited conduct and is further authorized to utilize Section 260(b) to develop additional safeguards against prohibited practices of Section 260(a) as incidences of anticompetitive conduct and patterns of practice are brought to its attention.

Section 260(c) defines the telecommunications services covered by Sections 260(a) and (b) and gives telemessaging a broad definition that includes live person-to-person recording, transcription and relaying, automated mail, retrieval and storage, and all ancillary services offered in combination with these services. These ancillary services, as with the primary services, are ever changing with technology development and consumer demands and

expectations and therefore must not be confined within a static list of products and services. Opportunities often present themselves from unexpected customer inquiries and small businesses must be able to respond quickly and with innovation to remain competitive.

While the Commission raises numerous questions in this NPRM to which ATSI attempts to respond, it is important to note that Section 260 applies to ***all*** incumbent network owners, ***all*** telemessaging services and operations, ***all*** practices and activities that involve or result in subsidies and discrimination, and operates in ***all*** markets, both intra- and interLATA.

Congress has purposefully given Section 260(a) this broad application, and the Commission must not develop rules that will limit the section's scope or practical applicability. Section 260(b) is intended to provide telemessagers with an efficient and expedient pathway to relief from prohibited conduct and practices, and the Commission must likewise not develop costly or time consuming rules of procedure or evidence that will undermine the availability of making an immediate appeal to the Commission. Section 260(b) should be available to telemessagers and their representative organizations, like ATSI, who seek relief from specific practices on a case-by-case basis as well as for relief from patterns of practice engaged in by one or more than one incumbent network owner.

SEP 4 - 1996

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the)	
Telecommunications Act of 1996:)	CC Docket No. 96-152
)	
Telemessaging,)	
Electronic Publishing, and)	
Alarm Monitoring Services)	

**Comments of the Association of
Telemessaging Services International**

Statement of Interest

The Association of Telemessaging Services International (ATSI) represents Enhanced Service Providers (ESPs) who offer, first and foremost, live, "person-to-person" answering services to the communications customer. ATSI also represents ESPs who offer automated telemessaging services. Telemessagers provide opportunities for call completion for their customers and offer options of voice messaging services, paging activation, as well as order taking and information exchange. Telemessagers address the special, personalized needs of the communications customer by providing *value-added services* to those services available from the incumbent network owner.

In order to establish effective safeguards against anticompetitive practices involving or resulting in subsidization of or discriminatory treatment in favor of telemessaging services offered by the incumbent network owners, ATSI supported passage of Section 260(a). Section 260(a) identifies the practices and activities that are now prohibited *without exception* and gives the Commission the authority to establish safeguards to prevent their occurrence. In order to provide an effective and expedient pathway to address this type of conduct, ATSI supported passage of Section 260(b). Section 260(b) provides the pathway through which telemessagers may bring to the attention of the Commission any violations of the prohibited activity and seek timely relief and remedies. In order to cover all primary and ancillary services offered now or in the future, ATSI supported passage of Section 260(c). Section 260(c) identifies a broad array of telemessaging services that are afforded protection and relief.

Response to NPRM

Unless otherwise indicated, the citations below refer to the paragraphs of this NPRM, FCC 96-310, CC Docket No. 96-152.

NPRM ¶¶ 16-17. The Commission recognizes the anticompetitive market advantages available to incumbents or their affiliates as owners of the telephony network. Incumbent network owners enjoy significant market power and potentially anticompetitive positions of advantage for themselves and their affiliates over ESPs like telemessagers who require access to the network through just, fair and reasonable arrangements for interconnection and collocation and utilization of the basic service functions of the network at costs disaggregated on a service-by-service basis.

The Commission identifies the potential for the incumbent to use its control over local exchange and exchange access markets to: 1) provide a quality service to itself or its affiliate that is higher than the service provided to a competing telemessenger; 2) provide exchange access services to itself or its affiliate at a lower rate than the rate charged to competing telemessengers; and 3) improperly shift costs from its telemessaging operations to the local telephone ratepayers and thereby reduce the costs of providing telemessaging below those offered by telemessengers like the members of ATSI.¹

Any showing of denied or delayed access to the network or the inability to provide value-added services demanded and expected of the communications customer will represent a *prima facie* claim for relief under Section 260(b). These and other examples of anticompetitive behavior have undeniable harm to telemessengers and Section 260(b) is intended to provide telemessengers with the means to effectively challenge these and eliminate them from the marketplace. Furthermore, Section 260(a) provides the Commission with the authority to develop safeguards, either at its own initiative or through the initiative of a complainant under Section 260(b), to protect telemessengers from this conduct.

NPRM ¶¶ 12 and 19. The Commission refers to its tentative conclusion that “telemessaging service constitutes an information service, and therefore ... BOC provision of telemessaging on an interLATA basis would be subject to the separate affiliate, non-discriminatory and cross-

¹The Commission recognized the potential for these same and similar anticompetitive practices in its Non-Accounting Safeguards NPRM. See FCC 96-308, paragraph 65. ATSI would remind the Commission that these practices can and have occurred in the provision of services on an intraLATA as well as interLATA basis and, as discussed below, Section 260, by making no distinctions between inter- and intraLATA operations, applies to both.

subsidization requirements of Section 272, in addition to the requirements of Section 260”. The Commission also refers to its tentative conclusion that its “authority under Sections 271 and 272 applies to intrastate and interstate interLATA information services provided by BOCs or their affiliates”. While ATSI agrees with these conclusions, ATSI members compete with the incumbent network owner in the provision of services on an intraLATA basis and, therefore, the protective prohibitions and remedies of Section 260 are applicable to intraLATA operations in order to have any practical impact for telemessagers.

NPRM ¶ 20. ATSI agrees that Section 260(a) imposes additional safeguards regarding the provision of telemessaging services and is applicable to the conduct of all incumbent LECs. In fact, Section 260 provides the Commission with jurisdiction over **all** conduct on the part of incumbents in the provision of **any** telemessaging service that involves or results in the cross-subsidization or discriminatory behavior prohibited. Equally importantly, Section 260(b) provides telemessagers opportunities to seek relief from prohibited conduct and practices.

The Commission is correct that “the scope of Section 260 ... is not strictly limited to interLATA services, nor is it limited to the BOCs”. Section 260 applies to all telecommunications services in all markets, including intraLATA. Any limitation of the applicability of Section 260 will undermine its intended protective scope and remedial strength. Because ATSI members provide telemessaging services almost entirely on an intraLATA basis, any attempt to limit Section 260 to interLATA services would deny these providers of telemessaging of its intended remedy.

NPRM ¶ 21. Section 260 provides the Commission with the authority to prevent any incumbent from: 1) subsidizing its telemessaging service directly or indirectly from its telephone exchange service or its exchange access; and 2) preferring or discriminating in favor of its telemessaging

service operations in its provision of **any and all** telecommunications services. Any state regulation that would “thwart or impede” the Commission’s attempt to prevent this activity should be preempted. Furthermore, as a practical matter it may not be possible to separate the interstate and intrastate portions of any regulations adopted to prevent the conduct prohibited by Section 260. For purposes of advancing the purpose of Section 260, the Commission should safeguard against the prohibited activity in all jurisdictions.

NPRM ¶ 75. The Commission asks whether “Section 260 applies to BOC provision of telemessaging, both on an intraLATA and interLATA basis”. As stated above, Section 260 makes no distinctions between intra- and interLATA service operations and is intended to apply to both intraLATA as well as interLATA telemessaging services. The clear purpose of Section 260 is to provide protection and remedies **in all markets** to all telemessagers who would otherwise be subject to anticompetitive activities such as those identified in paragraphs 16 and 17 in this NPRM.

The Commission asks “whether BOCs providing telemessaging services on either an inter- or intraLATA basis would be subject only to the requirements of Section 260” if it chooses to reject the conclusion that BOC provision of telemessaging on an interLATA basis is subject to both the requirements of Section 272 and Section 260. ATSI believes that the Commission need not engage in such an elaborate effort to interpret Section 260 or its interaction with other provisions of the Act. Specifically, Section 260(a) establishes an absolute prohibition against the anticompetitive practices of subsidization of telemessaging services and unfair preferential treatment on the part of the incumbent network owner towards itself or its affiliate in the provision of any and all telemessaging services.

NPRM ¶ 76. The definition for telemessaging provided by Section 260(c) clearly includes live, person-to-person telephone operator services used to record, transcribe, or relay messages and all automated mail, storage and retrieval services. The services included in the meaning of “ancillary” include all value-added services, in addition to those primary services, offered by telemessagers to the communications customer. The Commission need not and should not attempt to find distinctions that will effectively exempt certain services from the scope of Section 260.

The members of ATSI serve a variety of communications customers with a variety of services, including individuals by monitoring personal health care alarms and screening inbound calls and health and safety professionals and tradesmen with 24-hour or on-call response requirements. The telemessaging services offered by ATSI members include: lifeline monitoring, live answering, paging, faxing (including fax storage and forwarding), 800 answering, 900 servicing, alarm monitoring, as well as order entry and outbound telemarketing (both on a local, regional and national basis). ATSI members also offer audiotext/interactive voice services, electronic mail, voice mail, voice mail for group messaging and voice-mail with answer call, teletype (TTY) and teletype for the deaf (TTD).

NPRM ¶ 77. The Commission asks whether the prohibition against anticompetitive preferential and discriminatory treatment identified in Section 260(a)(2) “imposes greater obligations on LECs providing telemessaging service than currently exist under Sections 201 and 202 of the Act”. Section 260 prohibits *all* discriminatory activity and behavior on the part of the incumbent network owner that favors its own telemessaging services, or that of an affiliate, over that of a competing telemessenger like a member of ATSI. This must be read as an absolute prohibition. ATSI agrees that prohibitions under Computer III and ONA will continue to apply and should

not be inconsistent with the prohibition; however, Section 260 is not limited by existing rules or other provisions of the Act. All subsidization and discriminatory activity are absolutely prohibited. The Commission is authorized to develop safeguards under Section 260(a) and telemessagers may file complaints for expedited relief under Section 260(b). Therefore, to the extent that Computer III and ONA fail to address certain practices on the part of the incumbent that do fall within Section 260's prohibitions, the Commission is authorized to address them with safeguards under Section 260(a) and in response to complaints filed under Section 260(b). Furthermore, Section 260 applies to all incumbent network owners and distinctions between BOCs and other LECs are not necessary.

The Commission asks what rules are required to implement Section 260(a)(2). ATSI has argued in its comments filed in the Interconnection Proceeding, CC Docket No. 96-98, the Non-Accounting Safeguards Proceeding, CC Docket No. 96-149, and the Accounting Safeguards Proceeding, CC Docket No. 96-150 that safeguards must be established to ensure that ESPs like telemessagers have access to the incumbent network through interconnection and collocation and access to unbundled basic service functions with costs attributed to individual functionalities and features required to provide enhanced telecommunications services to the public. These will go a long way to protect against the subsidization and discrimination prohibited in Section 260(a). But Section 260(a) extends to all discriminatory conduct and applies beyond the access and cost issues raised in these other proceedings, and Section 260(b) allows telemessagers to bring to the Commission's attention all practices that are anticompetitive involving or resulting in the subsidization or discriminatory treatment.

For example, ATSI has identified the need of telemessagers to have immediately access CPNI once the appropriate request is submitted to the incumbent's CPNI coordinator. A telemessenger should be able to bring a complaint under Section 260(b) against any one or any group of incumbents who engage in a pattern of practice that repeatedly deny or delay access to CPNI.

While specific instances of denial or delay will require a determination within a time frame shorter than that available from Section 260(b), patterns of practice would be appropriate for the time frame of 120 and 60 days and remedies could be structured to guard against their occurrence in the future.

Furthermore, a single telemessenger or a group of telemessagers should be able to file a complaint under Section 260(b), including a recognized and properly incorporated membership organization representing specific telemessagers.

NPRM ¶ 82. The Commission asks what legal or evidentiary standards are required to "ensure a full and fair resolution of complaints" under Section 260. Section 260 is not intended to mimic a legal proceeding or create costly rules of evidence with which complainants are required to comply. While the Commission may choose to develop general rules in the proceeding planned for the expedited complaint procedures themselves, to overburden the complainant with costly and time consuming requirements would undermine the Section's intent of providing an efficient and expedient means of protection for the many small businesses that provide telemessaging services. The practical reality of a Section 260(b) complaint proceeding must involve: 1) the ability of a complainant to respond immediately to any prohibited conduct; and 2) an immediate focus at the Commission on the practices and conduct complained of and not on technical and procedural requirements that so often prolong dispute resolution in other forums.

The Commission also asks what *prima facie* showing should be required of a complainant that invokes the 120-day complaint resolution requirement and what specific acts or omissions are sufficient to state a *prima facie* claim for relief. Section 260 intends to provide telemessagers with protections against subsidization and discriminatory practices and a mechanism not available before passage of the Act to seek redress of such practices when they do occur. The complainant therefore need only bring to the attention of the Commission facts or circumstances that could result from prohibited conduct. For example, a telemessenger need only show that a request for access to the incumbent's network has been made and that interconnection has not been accomplished, or unbundled network functions or features have not been made available, to engage the Commission in its responsibilities under Section 260. Furthermore, any showing of a denial or undue delay in providing access to the network and any showing of cost or quality differentials between the incumbent's own telemessaging operations and those offered by the complainant will represent a *prima facie* claim for relief. Therefore, the inability of a telemessenger to secure access to the necessary network functions and features to offer the value-added services expected by the communications customer will represent sufficient showing under Section 260(b) that conduct prohibited under Section 260(a) has occurred.²

²In paragraph 21 of this NPRM, the Commission identifies principal practices prohibited under Section 260(a) and therefore subject to safeguards authorized by Section 260(a) and to the relief authorized under Section 260(b). These practices on the part of the incumbent network owner should be subject to the Commission's immediate scrutiny in its development of safeguards under the Non-Accounting and Accounting Safeguards Proceedings, CC Docket Nos. 96-149 and 96-150. They should also be immediately challengeable by telemessagers in their more subtle forms which may not be initially identified in safeguards adopted by the Commission.

Further examples of conduct covered by Section 260(a) and subject to Section 260(b) are the failure of the incumbent to place a telemessenger's directory listings in the Yellow Pages, any delay in immediately responding to CPNI requests, or the unfair and anti-competitive results of the incumbent's requesting CPNI authorization for itself through its monthly billing.

In the development of any and all rules governing Section 260 procedures, the Commission must preserve the goal of providing telemessagers an efficient and expedient pathway for relief from prohibited practices on the part of incumbent network owners. Furthermore, no rules should have the practical effect of requiring telemessagers to undertake costly and time consuming preparatory work before being allowed to file a complaint with the Commission. No rule should impose a burden on telemessagers that interfere with their ability to immediately respond to a violation of Section 260.

As a general principal, the burden of proof begins and remains on the incumbent network owner. The incumbent will control and have custody of the information that will allow the Commission to resolve any issue or issues raised in a Section 260(b) complaint. This is very often the same information that would be required in order for the complainant to meet higher evidentiary standards that are inappropriate under Section 260(b). It is in fact the ownership and control over the network that provides the incumbent network owner the ability to engage in prohibited and anticompetitive conduct to begin with and the complainant should not be expected to access information that will provide the Commission with the information and facts necessary to render a determination of the complaint raised. The incumbent has the burden of proof at all times to rebut the complaint and it is the Commission, not the complainant, that is in the unique position to access the information necessary to make a determination within either the 120- or 60-day time frames of Section 260(b).

NPRM ¶ 83. The Commission asks for guidance on the meaning of “meaningful financial harm”. Again, ATSI urges the Commission to refrain from developing costly or complex evidentiary standards and agrees that the Commission should decide the materiality of the harm on an individual, case-by-case basis. Nevertheless, all cases involving denial of access of the incumbent’s network or delay in responding to request for access by a telemessenger will always result in material financial harm. The denial or delay in providing access to the network, either through interconnection, collocation or utilization of specific network functions and features always represent meaningful financial harm. Meaningful financial harm need not be demonstrated by actual dollars lost. Many instances of the harm realized by telemessengers as ESPs will be in lost opportunities resulting from prolonged negotiations for network access or delayed access to CPNI.

For those complainants who fail to show material financial harm, recourse should always be available through the Commission’s formal complaint procedures. Furthermore, remedies should be available through alternative dispute resolution such as those authorized under Section 252 of the Act. ATSI has argued in the Interconnection Proceeding, CC Docket No. 96-98, for the utilization of alternative dispute resolution where that would achieve a timely and less costly resolution of disputes involving the various interconnection needs of ESPs. Mediation and arbitration opportunities at the state level should be available to ESPs, and these, as well as the Commission’s formal complaint procedures and the Section 260 expedited complaint procedures are not mutually exclusive. Any one of these avenues may provide the most appropriate forum for telemessengers in a given situation.

NPRM ¶ 84. Section 260 requires the Commission, upon an “appropriate showing”, to order the incumbent and affiliate where appropriate to cease in engaging in the identified activity until the final outcome is determined. The Commission asks what constitutes an appropriate showing in order for the Commission to issue the incumbent an order to “cease engaging” in the alleged violation. An appropriate showing regarding network access issues will be a statement that a request has been made for interconnection, collocation or access to unbundled network elements and that such a request has been denied or a response to such a request has not been forthcoming or has been unduly prolonged. In all cases, an appropriate showing has been made where the complainant demonstrates that an attempt has been made and the result has not been accomplished. A complaint that likewise shows a pattern of practice (where the conduct has occurred on more than one occasion and will continue to occur) that violates Section 260(a) prohibitions should also trigger the 60-day cessation order.

Furthermore, the Commission should develop presumptions regarding access to network elements, including the presumption that if any one incumbent is offering a basic service function, then any other will be able to do so. Another presumption will be that if an incumbent is able to offer its own telemessaging service, then a telemessenger should be able to access the network for purposes of providing a similar telemessaging service. These presumptions should also provide the basis for appropriate showings under Section 260(b) that would authorize the Commission to order the incumbent network owner to cease in engaging in prohibited conduct.

The Commission asks what actions it should take to deter violations of and facilitate the prompt disposition of complaints under Section 260. As already suggested, Section 260(a) prohibits all anticompetitive conduct that involves or results in subsidization of or preferential treatment towards an incumbent’s telemessaging operations. The Commission is therefore charged with

the responsibility of implementing safeguards to prevent this conduct. Any violation of these safeguards will represent a *prima facie* claim for a Section 260(b) complaint. Any initial safeguards developed should be modified from time to time and Section 260(b) complaints should be allowed to specifically request new or amended safeguards where a pattern of practice is demonstrated to exist for one or more than one incumbent, or when new tactics of delay or denial are employed.

Conclusion

ATSI members provide their telemessaging services almost exclusively on an intraLATA basis. Section 260 is intended to protect these telemessagers against anticompetitive subsidization and discriminatory practices on the part of incumbent network owners. The Commission should recognize Section 260 as the broadest of safeguards now available to telemessagers, not to be supplanted by existing rules or other provisions of the Act. Section 260 prohibits ***all*** incumbent network owners from engaging in ***all*** anticompetitive activities that involve or result in subsidies for their own telemessaging operations, or preferences and discrimination in favor of their own telemessaging operations, in ***all*** telecommunications markets. Therefore, as a practical matter, Section 260 also prohibits the anticompetitive results of these activities on the telemessaging services and their ancillary services provided by telemessaging ESPs like the members of ATSI.

Furthermore, Section 260 makes no distinction between intraLATA and interLATA and therefore the Commission must conclude that Section 260 applies to both intraLATA and interLATA services. Based on the plain language of the statute, incumbent network owners are ***absolutely*** prohibited from subsidizing their telemessaging services, directly or indirectly, from their telephone exchange service or their exchange access. Incumbent network owners are further ***absolutely*** prohibited from preferring or discriminating in favor of their telemessaging service operations in their provision of any and all telecommunications services.

The Commission need not engage in inquiries as to what circumstances these prohibitions may or may not apply because the statute entertains no such exceptions. All incumbents and all telemessaging services offered by incumbents are subject to the prohibitions of Section 260(a) and to the expedited procedures of Section 260(b). Any reduction in scope or application would

be contrary to the intent of Congress in passage of Section 260 and interfere with the pro-competitive goals of the Act.

Finally, telemessagers may seek relief and remedies under Section 260(b) for specific, case-by-case practices prohibited under Section 260(a) as well as relief and remedies for patterns of practice that involve or result in the prohibitions of Section 260(a).

ATSI urges the Commission to develop rules for Sections 260(a) and (b) that give the full force and effect of the provision's intended role in securing a fair and competitive environment for telemessaging ESPs. The statutory language of Section 260 provides no basis for limiting its scope or application, and any attempts to do so are inconsistent with congressional intent and the Act's pro-competitive goals.

Respectfully submitted,

ASSOCIATION OF TELEMESSAGING
SERVICES INTERNATIONAL (ATSI)

By: 

Frank Moore
Smith, Bucklin & Associates, Inc.
Government Affairs Division
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5100

Its Regulatory Counsel

Herta Tucker
Executive Vice President
Association of Telemessaging Services International
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5151